LIBRARY
SUPREME COURT, U.S.

Nos. 805

Supreme Court, U.S.
FILED
DEC 8 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

MADELINE SYLVESTER,
Petitioner,

vs.

LORRAINE I. MESSLER, Administratrix of the Estate of Adeline Elizabeth Houghton, Deceased,
Respondent.

No. .....

MAUDE OLDFIELD,
Petitioner,

vs.

LORRAINE MESSLER, Administratrix of the Estate of Adeline Elizabeth Houghton, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PAUL B. MAYRAND,
Counsel for Petitioners,
1712 Ford Building,
Detroit, Michigan 48226.
WO 1-8831.

ERIC E. ZISMAN,
With Him on Petition.

Interstate Brief & Record Co., 356 Congress St. E., Detroit, Michigan 48226

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Rules Involved	2
Statement of the Case	2-3
Reasons for Granting Writ	3-4
Relief Sought	4
Decision of the U. S. Circuit Court of Appeals for the Sixth Circuit	5-6

INDEX TO AUTHORITIES

Federal Rules of Court Procedure (Rule 3)	2, 3
Hanna v. Plumer, 380 U.S. 460	3
Ragan v. Merchants Transfer Co., 337 U.S. 530	3
Sixth and Fourteenth Amendments to the Constitution of the United States	2, 3
Statute of Limitations:	
Mich. St. Ann., 27A 5805	3
27A 5856	3
Statute of Limitation:	
Florida St. Ann., 95.11	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

MADELINE SYLVESTER,
Petitioner,
vs.
LORRAINE I. MESSLER, Administratrix of the Estate of
Adeline Elizabeth Houghton, Deceased,
Respondent.

No. .....

MAUDE OLDFIELD,
Petitioner,
vs.
LORRAINE MESSLER, Administratrix of the Estate of
Adeline Elizabeth Houghton, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals 6th Circuit, is reported at ... F20, ... A copy of the opinion is printed as an appendix to this Petition (pages 5-6, *infra*).

JURISDICTION

The opinion of the Court of Appeals was filed on the 10th day of September, 1965. The jurisdiction of the Court is invoked under the Rules of the Supreme Court.

QUESTIONS PRESENTED

Whether or not Petitioners' causes of action are barred by the Statute of Limitations?

The Lower Court held that the answer is "Yes". Petitioners contend the answer is "No".

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Sixth and Fourteenth Amendments to the Constitution of the United States of America.

RULES INVOLVED

Rule 3 of the Federal Rules of Court Procedure.

STATEMENT OF THE CASE

The Petitioners, citizens of Ohio, filed their Complaint in the United States District Court for the Eastern District of Michigan to recover for personal injuries resulting from an automobile accident allegedly caused by the negligence of a Michigan citizen, deceased at the time of the filing of the Complaint. The accident occurred on February 17, 1961 in the State of Florida. They commenced their action on February 14, 1964, on the 8th day thereafter, one of Plaintiff's attorneys personally served Respondent without securing a court order to so do. Respondent filed a mo-

tion to dismiss, pleading the Statute of Limitations, which is three years in the State of Michigan, Mich. St. Ann., 27A 5805, 5856, and four years in the State of Florida, Fla. St. Ann. 95.11.

Because Michigan Law requires that service be had prior to the three year period or summons and complaint be placed in the hands of the Marshal or Sheriff to toll the Statute of Limitations, notwithstanding Rule 3, of the Federal Rules of Court Procedure, which provides that a court action is commenced by filing a Complaint with the court, the District Court granted Respondent's motion to dismiss, based on the Statute of Limitations, and the Court of Appeals for the Sixth Circuit affirmed.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals should be reviewed because it erroneously interprets the rights of the Petitioners under the Sixth and Fourteenth Amendments of the United States Constitution and Rule 3 of the Federal Court Rules of Procedure.

First: The decision of the Sixth Circuit erroneously misinterprets the opinion of Chief Justice Warren and Justice Harlan in *Hanna v. Plumer,* 380 U.S. 460, (decided April 26, 1965)

The Sixth Circuit relied on the case of *Ragan v. Merchants Transfer Co.,* 337 U.S. 530 (decided in 1949), and that the Hanna case did not reverse the Ragan case.

In the *Hanna* case, Justice Harlan stated in part, on page 20:

> "In Ragan a Kansas statute of limitations provided that an action was deemed commenced when service was made on the defendant. Despite Federal

Rule 3 which provides that an action commences with the filing of the complaint, the Court held that for purposes of the Kansas statute of limitations a diversity tort action commenced only when service was made upon the defendant. The effect of this holding was that although the plaintiff had filed his federal complaint within the state period of limitations, his action was barred because the federal marshal did not serve a summons on the defendant until after the limitations period had run. I think that the decision was wrong. At most, application of the Federal Rule would have meant that potential Kansas tort defendants would have to defer for a few days the satisfaction of knowing that they had not been sued within the limitations period. The choice of the Federal Rule would have had no effect on the primary stages of private activity from which torts arise and only the most minimal effect on behavior following the commission of the tort. In such circumstances the interest of the federal system in proceeding under its own rules should have prevailed."

RELIEF SOUGHT

Certiorari should be granted.

Respectfully submitted,

PAUL B. MAYRAND,
Counsel for Petitioners,
1712 Ford Building,
Detroit, Michigan 48226,
WO 1-8831.

ERIC E. ZISMAN,
With Him on Petition.

Dated: Detroit, Michigan
December 6, 1965.

Nos. 16,106-107

IN THE

United States Court of Appeals for the Sixth Circuit

MADELINE SYLVESTER,
Plaintiff-Appellant,
vs.
LORRAINE I. MESSLER, ADMINISTRATRIX OF THE ESTATE OF ADELINE ELIZABETH HOUGHTON, DECEASED,
Defendant-Appellee.

MAUDE OLDFIELD,
Plaintiff-Appellant,
vs.
LORRAINE I. MESSLER, ADMINISTRATRIX OF THE ESTATE OF ADELINE ELIZABETH HOUGHTON, DECEASED,
Defendant-Appellee.

APPEAL from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Decided September 10, 1965.

Before: O'SULLIVAN *and* EDWARDS, Circuit Judges; MATHES, Senior District Judge.*

PER CURIAM. These are appeals from dismissal of plaintiffs-appellants' complaints in diversity actions resulting from an automobile accident. The United States District Judge dismissed these suits on motion because of plain-

* William C. Mathes, sitting by designation from the United States District Court for the Southern District of California.

tiffs' failure to comply with the time and service requirements of the Michigan Statute of Limitations, Mich. Stat. Ann., 1962 Rev., §§27A.5805 and 27A.5856.

The District Judge held that *Ragan v. Merchants Transfer Co.*, 337 U.S. 530 (1949), mandated application of the state limitation provisions cited above. We agree with Judge Kaess' brief but well-reasoned opinion, *Madeline Sylvester, et al. v. Lorraine I. Messler,* ... F. Supp. ... (E.D. Mich. 1964).

At oral argument and by supplemental briefs, appellants suggested to this court, however, that a United States Supreme Court case decided a year after the District Court opinion referred to above had overruled the *Ragan* case. We have examined the opinion of Chief Justice Warren in *Hanna v. Plumer,* 380 U.S. 460 (1965), and conclude that although it refers to and cites *Ragan,* it carefully refrains from overruling same. The instant case appears to us to be directly governed by *Ragan.*

Affirmed.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 6 1966
JOHN F. DAVIS, CLERK

No. 805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 805

MADELINE SYLVESTER,
Petitioner,
vs.
LORRAINE I. MESSLER, Administratrix of the Estate of Adeline Elizabeth Houghton, Deceased,
Respondent.

No. 805

MAUDE OLDFIELD,
Petitioner,
vs.
LORRAINE MESSLER, Administratrix of the Estate of Adeline Elizabeth Houghton, Deceased,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. EGGENBERGER
1505 Dime Building,
Detroit, Michigan 48226,
Counsel for Respondent.

Inkwell Brief & Record Co., 156 Congress St. E., Detroit, Michigan 48226

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Argument	2-6

INDEX TO AUTHORITIES CITED

Beldwin v. Blackman, 118 Mich. 448 and 124 Mich. 667	5
Bomar v. Keyes, (C.C.A. 2nd, 1947) 162 F. 2nd 136, certiorari denied 332 U.S. 825	5
Hagy v. Allen (E. D. Kentucky, 1957) 153 F. Supp. 302	4
Hanna v. Plumer, 380 U.S. 460	6
Home Life Insurance v. Elwell, 111 Mich. 689	5
Hukill v. Pacific and A. R.&N. Co., (D.C. Alaska, 1958) 159 F. Supp. 571	5
Isaacks v. Jeffers, (C.C.A. 10th, 1944) 144 F. 2nd 26	4
Mahan v. Ohio Auto Rentals Co., (S. D. Ohio, W. D., 1962) 207 F. Supp. 383	4
Maki v. George R. Cooke Co., (C.C.A. 6th, 1942) 124 F. 2nd 663	5
Millar v. Hilton, 189 Mich. 635	5
Ragan v. Merchants Transfer and Warehouse Co., (1949) 337 U.S. 530	3
Sylvester v. Messler, 246 F. Supp. 1	2, 3
Sylvester v. Messler, 351 F. 2d 472	2
Tocco v. Time, Inc., (E.D. Mich. S.D., 1961) 195 F. Supp. 410	5
Wells v. Simonds Abrasive Co. (1953) 345 U.S. 514	5
2 Moore's Federal Practice §3.07 (4-3-1) (2nd ed. 1962)	3, 5
1 Barron & Holtzoff, Federal Practice & Procedure §163 (Wright ed. 1960)	3, 5
Restatement, Conflict of Laws, §603	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 805

MADELINE SYLVESTER,
Petitioner,
vs.
LORRAINE I. MESSLER, Administratrix of the Estate of Adeline Elizabeth Houghton, Deceased,
Respondent.

No. 805

MAUDE OLDFIELD,
Petitioner,
vs.
LORRAINE MESSLER, Administratrix of the Estate of Adeline Elizabeth Houghton, Deceased,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is correctly quoted in full in the Petition for Writ of Certiorari commencing at page 5 and ending at page 6. It is reported in 351 F. 2d 472. The opinion by the trial court is also quoted in

the Appendix of Appellants filed separately by Petitioners commencing at page 13a and ending at 14a. It is reported in 246 F. Supp 1.

JURISDICTION

Petitioners timely filed their petition for Writ of Certiorari pursuant to the Rules of this Court.

QUESTIONS PRESENTED

Respondent accepts petitioners' question whether their causes of action are barred by the Michigan Statute of Limitations?

Respondent denies that there are any constitutional provisions involved.

STATEMENT

Respondent adopts petitioners' statement of the case with the exception that petitioners did not commence "* * * their action on February 14, 1964, * * *." They merely filed their complaints and had summonses issued February 14, 1964, but failed to turn copies over to the United States Marshall for service.

ARGUMENT

The opinion of the Court of Appeals, *Sylvester v. Messler*, 351 F. 2d 472, and the opinion of the trial court, *Sylvester v. Messler*, 246 F. Supp. 1, and petitioners' application for writ of certiorari clearly reflect that there are no special or important reasons that support the instant petition for writ of certiorari.

The syllabus in *Sylvester v. Meisler*, 246 F. Supp. 1, succinctly states the applicable rules of law as follows:

> "In determining whether a state statute of limitations has been tolled a federal court in diversity must apply the same rule as the local court would apply, at least where it is integral part of the statute."
>
> "Definite procedure prescribed for tolling Michigan statute of limitations is integral part of statute and must be applied by federal court in diversity case."

The various decisions on this point are dealt with at length in *2 Moore's Federal Practice* §3.07 (4-3-1) (2nd ed. 1962), where it is pointed out that the controlling case is *Ragan v. Merchants Transfer and Warehouse Co.*, (1949) 337 U.S. 530. It involves a Kansas statute of limitations and stands for the proposition that in diversity cases involving non-federal actions there should be no difference in result when the action is brought in the federal court from what it would be in the state court. *Moore, supra,* further points out that the weight of authority since *Ragan* has followed this rationale. There are cases wherein some lower federal courts have refused to follow the state rule by distinguishing the *Ragan* case on the basis that the particular state rule involved was not an integral part of that state's statute of limitations. This latter line of cases is criticized in *Moore's Federal Practice* on the basis that the *Ragan* case was not primarily decided on the premise that the state law involved was an integral part of the Kansas statute of limitations but on the broader premise that a different result should not concur in the federal court than would occur in the Kansas state court. See also *1 Barron & Holtzoff*, Federal Practice & Procedure §163 (Wright ed. 1960).

In any event, the instant case clearly involves a situation where the Michigan law governing the steps necessary to commence an action and effectively toll the statute of limitations is an integral part of the Michigan statute of limitations. Mich. Stat. Ann., 1962 Rev., 27A 5856. This statutory provision is quoted in full in the Appendix for Appellants on page 14a.

None of the cases cited in petitioners' brief in their Appendix are applicable. *Mahan v. Ohio Auto Rentals Co.*, (S. D. Ohio, W. D., 1962) 207 F. Supp. 383, and *Hagy v. Allen* (E. D. Kentucky, 1957) 153 F. Supp. 302, distinguish the *Ragan* case on the basis that the court did not feel that the state rule regarding the commencement of a cause of action was an integral part of that state's statue of limitations. It is interesting to note that in each of these cases the court was dealing with the rather strict provisions of a Kentucky statute which provided only one year within which to bring a cause of action for personal injuries. The case of *Isaacks v. Jeffers,* (C. C. A. 10th, 1944) 144 F. 2nd 26, was decided prior to *Ragan* and therefore is not controlling.

It must be further noted that even if the instant cases involved a federally created cause of action and which would then come under the purview of Rules 3 and 4 (a) of the Federal Rules of Civil Procedure, there is still a question of whether the Plaintiff-Appellants' actions in the instant case would be sufficient to toll the statute of limitations under the federal law. It has been pointed out by the cases involving federally created rights that a plaintiff must not only file his complaint under Rule 3 but must also have summons issued and have said summons and complaint placed in the hands of the United States Marshal for service pursuant to Rule 4 (a) in order to commence

his action. *Bomar v. Keyes,* (C.C.A. 2nd, 1947) 162 F. 2nd 136, certiorari denied 332 U.S. 825; *Hukill v. Pacific and A. R.&N. Co.,* (D.C. Alaska, 1958) 159 F. Supp. 571; 1 *Barron & Holtzoff, Federal Practice and Procedure* §163 (Wright ed. 1960).

Initially petitioners questioned the trial court's application of the statute of limitations of Michigan which is 3 years rather than the Florida statute of limitations which is 4 years. If this question is given consideration, then Defendant-Appellee points out the well established rule of law in diversity cases involving non-federal questions that the federal court must apply whatever statute of limitations the court of the forum state would apply. *Wells v. Simonds Abrasive Co.,* (1953) 345 U.S. 514; 2 *Moore, Federal Practice* §307 (2) (2nd ed. 1962); *Maki v. George R. Cooke Co.,* (C.C.A. 6th, 1942) 124 F. 2nd 663. Likewise, it can scarcely be questioned that the conflicts of law rule adhered to in Michigan requires that the Michigan statute of limitations be applied when Michigan is the forum state. *Home Life Insurance v. Elwell,* 111 Mich. 689; *Beldwin v. Blackman,* 118 Mich. 448 and 124 Mich. 667; *Millar v. Hilton,* 189 Mich. 635; *Tocco v. Time, Inc.,* (E.D. Mich. S.D., 1961) 195 F. Supp. 410; *Restatement, Conflict of Laws,* §603.

Moreover, as pointed out in the lower court's opinion (14a) Michigan has adopted the Uniform Statute of Limitations on Foreign Claims Act and incorporated it as an integral part of the Michigan Statute of Limitations. Mich. Stat. Ann., 1962 Rev., Sect. 27 A.5861. It should be noted that the Uniform Statute of Limitations on Foreign Claims Act was in full effect in Michigan at the time Plaintiffs-Appellants filed their complaints. This statute expressly provides that the period of limitation applicable to a claim accruing outside of Michigan shall be either that prescribed

by the law of the place where the claim accrued or by the law of Michigan, whichever bars the claim.

Petitioners question the interpretation by the Court of Appeals of *Hanna v. Plumer,* 380 U.S. 460. The respondent argued that *Hanna* neither overruled nor changed the rule of law expressed in *Ragan.* Briefly, this argument is predicated on a distinction of facts and difference between the Michigan statute of limitations from the one in effect in Massachusetts. The Court of Appeals agreed with respondent in the following language:

> "We have examined the opinion of Chief Justice Warren in *Hanna v. Plumer,* 380 U.S. 460 (1965), and conclude that although it refers to and cites *Ragan,* it carefully refrains from overruling same. The instant case appears to us to be directly governed by *Ragan.*"

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. EGGENBERGER,
1505 Dime Building,
Detroit, Michigan 48226,
Counsel for Respondent.